

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**DEFENDANTS' BENCH MEMORANDUM REGARDING THE PUBLIC RECORDS
EXCEPTION TO THE HEARSAY RULE PURSUANT TO FEDERAL RULE OF
EVIDENCE 803(8)(C)**

Defendants respectfully submit this bench memorandum of points and authorities regarding the admission of materials pursuant to the public records exception set forth in Federal Rule of Evidence 803(8)(C). While Rule 803(8)(C) provides an exception to the hearsay rule for certain public records, the exception is far from limitless and does not discard out-of-hand the traditional limitations on hearsay-within-hearsay, credibility, and reliability. At bottom, a government litigant cannot escape the rules governing hearsay and scientific evidence simply by reducing to writing self-serving hearsay that would be properly objectionable in the event the author attempted to testify to it directly.

The State has sought and may continue to seek the admission of various documents generated by government agencies under Federal Rule of Evidence 803(8)(C). That rule allows the admission of

[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Rule 803(8)(C) thus establishes three foundational requirements, namely that the tendered exhibit: (1) contain factual findings of a public office or agency; (2) that result from an investigation; (3) made pursuant to authority granted by law. *Id.* If that foundation is laid, the party opposing introduction of the document may still seek to have it excluded because it indicates a lack of trustworthiness.

This is inherently a line-drawing exercise, where some documents (or portions thereof) will come into evidence and some will not. The decision to admit or exclude a document under 803(8)(C) is within the sound discretion of the District Court. *See Perrin v. Anderson*, 784 F.2d 1040, 1047 (10th Cir. 1986). Indeed, the Tenth Circuit has emphasized that the trial court is the “first and best judge ... of trustworthiness and reliability.” *Franklin v. Skelly Oil Co.*, 141 F.2d 568, 572 (10th Cir. 1944); *accord Kloepfer v Honda Motor Co., Ltd.*, 898 F.2d 1452, 1458 (10th Cir. 1990) (“The district court is the first and best judge of whether tendered evidence meets the Rule 803(8)(C) standards of trustworthiness and reliability.”); *Chicago Ins. Co. v. Chimnee Cricket*, 17 Fed. App’x. 374, 377-78 (6th Cir. 2001).

Rule 803(8)(C) is not applied mechanically. Instead, the Supreme Court has noted that one portion of a report may be admissible under Rule 803(8), while other portions do not meet the Rule’s requirements. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) (stating that “the trustworthiness provision” of Rule 803(8) “requires the [district] court to make a determination as to whether the report, *or any portion thereof*, is sufficiently trustworthy to be admitted.”) (emphasis added); *see also Desrosiers v. Flight Int’l of Florida, Inc.*, 156 F.3d 952, 962 (9th Cir. 1998). “As with any exception to the rule against hearsay, Rule 803(8)(C) is to be applied in a commonsense manner, subject to the district court’s sound exercise of discretion in determining whether the hearsay document offered in evidence has sufficient independent indicia

of reliability to justify its admission.” *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir. 1981).

I. States’ Exhibit 5107 Was Properly Excluded

After lengthy argument, the Court has three times excluded States’ Exhibit 5107. *See* Ex. A (Trial Tr. Sep. 30, 2009, at 330:7 – 338:25) (initial ruling); *id.* at 458:6 – 459:17 (admitting the exhibit but stating that the exhibit would be excluded if Defendants objected on the pretrial order); Ex. A (Trial Tr. Oct. 1, 2009 at 502:13 – 507:5) (striking exhibit based on objection on the pretrial order). The State seeks reconsideration. *See* Dkt. No. 2659 at 13.¹ The Court’s rulings were proper and should be sustained. As the Court observed, Exhibit 5107 is not a record of an agency’s factual findings following an investigation, but rather is a programmatic document developed by the Office of the Secretary of the Environment to assist in its policy deliberations. *See* Ex. A Trial Tr. at 333:1-14.

Such statements of policy, concern, or intended state actions do not qualify as “factual findings” from a state investigation under Rule 803(8). For example, in *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F.3d 96, 100, 108-10 (3d Cir. 1999), the New Jersey Department of Environmental Protection issued directives asserting that particular individuals were responsible for particular environmental contamination and stating the State’s plans for compelling cleanup. Rejecting these publications, the Third Circuit noted that they were more akin to an assertion of the state’s allegations and intended course of action than a “factual

¹ Although the State asks this Court to reverse its earlier decisions, the State does not acknowledge that its motion is one for reconsideration. Reconsideration of the Court’s ruling is justified only in the event of: “(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.” *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Plaintiff makes no attempt to satisfy the Tenth Circuit’s rigorous standard, *see* Dkt. No. 2659, nor could it satisfy that standard here. The Court should reject the State’s motion on this basis alone.

finding” resulting from an investigation. *Id.* This decision is on all fours with the Court’s assessment of Exhibit 5107. Secretary Tolbert agreed that the document’s purpose was “a strategy for action.” *Id.* And, indeed, on its face Exhibit 5017 is a policy statement that touts the efforts of the Office of the Secretary of the Environment and related agencies rather than undertaking an investigation and announcing resulting factual findings.

Additionally, as the Court recognized, Exhibit 5107 is rife with instances of hearsay-within-hearsay. *See* Ex. A. at 334:25-338:1. The document includes data and opinions drawn from absent speakers, many of whom apparently have no connection to the author(s). Indeed, Secretary Tolbert confirmed in his testimony that this document draws from numerous sources outside of the Office of the Secretary of the Environment. *See id.* at 331:24-332:4.² The document makes numerous unsupported assertions of a pseudo-scientific nature that cannot be cross-examined or subject to any reliability or trustworthiness analysis. As the State asserts, “the general rule is that ‘factual findings’ must be based upon the knowledge or observations of the preparer of the report, as opposed to second hand knowledge, such as statements made by third parties.” *See* Dkt. No. 2659 at 4-5.

As the Court observed, the rules governing admissibility under Rule 803(8)(C) are detailed and will require application and line drawing on a case-by-case basis. *Id.* at 300:21-25. The Court has already properly drawn the lines on the documents offered to date and has excluded Exhibit 5107. Plaintiffs’ bench brief identifies no basis for going backwards.

² Secretary Tolbert also confirmed that these reports draw data from out-of-state agency reports. *Id.* at 350:15-22.

II. Application of Federal Rule of Evidence 803(8)(C)

A. Rule 803(8)(C) Does Not Authorize the Admission of Multiple Levels of Hearsay Absent a Separate Exception from the Hearsay Rules or Sufficient Indicia of Reliability

A public record is admissible under Rule 803(8)(C) only to the extent that it sets forth the factual findings resulting from an investigation conducted by a public office or agency pursuant to a legal duty. Defendants concur with the State and Professor Weinstein that “the general rule is that ‘factual findings’ must be based upon the knowledge or observations of the preparer of the report, as opposed to second hand knowledge, such as statements made by third parties.” Dkt. No. 2659 at 4-5 (quoting Weinstein’s Federal Evidence § 803.10[3][a] (2009)). In fact, the Advisory Committee Notes to Rule 803 set out this limitation.

The “factual findings” in a report qualifying for a Rule 803(8)(C) exception to the hearsay rule must ... be based upon the knowledge or observations of the preparer of the report. As stated in the Advisory Committee Notes to Rule 803, “[i]n a hearsay situation, the declarant is, of course, a witness and neither this Rule nor Rule 804 dispenses with the requirement of firsthand knowledge.

Miller v. Field, 35 F.3d 1088, 1091 (6th Cir. 1994)

As the Ninth Circuit stated in *United States v. Chu Kong Yin*, 935 F.2d 990 (9th Cir. 1991), “[t]he mere fact that a document qualifies as a public record ... does not *ipso facto* overcome the hearsay objection unless the document relates to an event to which the author could himself testify. This is for the reason that the public documents exception to the hearsay rule is only the substitute for the appearance of the public official who made the record.” *Id.* at 999. *See also United States v. Central Gulf Lines, Inc.*, 974 F.2d 621, 626 (5th Cir. 1992) (“First, the person making the report must have observed the matters contained in the report firsthand. Second the report must be prepared pursuant to a duty imposed by law. Third, the documents and surrounding circumstances must indicate trustworthiness.”); *Complaint of*

Paducah Towing Co., Inc., 692 F.2d 412, 420-21 (6th Cir. 1982) (“Several courts have indicated that factual findings, which are based on inadmissible hearsay, are not admissible under Rule 803(8)(C) because the underlying information is untrustworthy.”).

Thus, it is generally inappropriate to employ a government document to bring into evidence statements of absent speakers that would be excluded as hearsay if the report’s author attempted to testify to those statements. The Tenth Circuit has enforced this rule. *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 820-21 (10th Cir. 1981) (affirming exclusion of agency probable cause determination that contained double- and triple-hearsay). In sum, the hearsay exception set forth in Rule 803(8)(C) absolves only the hearsay of the document itself; it does not extend to hearsay-within-hearsay. *See, e.g., McKinnon v. Skil Corp.*, 638 F.2d 270, 278-79 (1st Cir. 1981) (“The CPSC reports are untrustworthy because they contain double hearsay in many instances the CPSC investigator at one level, and the accident victim interviewee at yet another level removed.”); *see also John McShain Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635-36 (3d Cir. 1977); *Heary Bros. Lighting v. Lightning Prot. Inst.*, 287 F. Supp. 2d 1038, 1076 (D. Ariz. 2003).

This rule is supported by Federal Rule of Evidence 805, which specifically requires that each step of a hearsay chain separately qualify for a hearsay exception, and Rule 803(8) says nothing about displacing Rule 805. *See, e.g., Complaint of Paducah Towing Co.*, 692 F.2d at 420-21 (citing Fed. R. Evid. 805 in noting that courts have held double-hearsay to be inadmissible, even under Fed. R. Evid. 803(8)); *Lewis v. Velez*, 149 F.R.D. 474, 487 (S.D.N.Y. 1993) (citing Fed. R. Evid. 805 for the proposition that “Rule 803(8) does not circumvent the hearsay rule; any double hearsay contained in a report is admissible only if each level of hearsay qualifies independently for a hearsay exception.”). Thus, to the extent that a document repeats

the out-of-court finding or statement of another, that further hearsay must also come within a hearsay exception to be admissible. *See also Fraley v. Rockwell Intern. Corp.*, 470 F. Supp. 1264, 1267 (D.C. Ohio 1979) (“If the factual findings in the public document themselves are based upon hearsay, then the underlying hearsay also must fit within an exception to the general hearsay rule for the public document to be admissible.”).

In some cases courts have admitted government reports that included the hearsay statements of absent parties.³ However, these cases generally arise under circumstances where the out-of-court statement itself fits within another exception to the hearsay rule and was therefore permissible. For example, in *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1309-10 (5th Cir. 1991), the court analogized the investigator in that case to an expert witness who may rely upon hearsay in forming his opinions. Similarly, in *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984), the alleged hearsay consisted of medical data collected in the ordinary course of the agency’s business.

The State suggests that multiple layers of hearsay may be ignored where the sources are uniformly governmental. Thus, the State would have this Court automatically accept any double- or triple-hearsay if all of the speakers work for some government. This blanket embracement of administrative reliability goes too far. Courts evaluate the admissibility of each document on a case-by-case basis and have excluded factual findings that are based on inadmissible hearsay even when those second-level hearsay statements come from other government officials. For example, in *Miller v. Field*, 35 F.3d at 1091-92, the Sixth Circuit

³ The State’s discussion of *Hernandez v. City of Albuquerque*, is dicta in that the plaintiff there failed to actually identify any instances of double-hearsay within the challenged document. 2004 U.S. Dist. LEXIS 30820, at *14 (D.N.M. Jan 24, 2004). Similarly in *Rodriguez v. City of Houston*, 250 F. Supp. 2d 691, 700 n.2 (S.D. Tex. 2003), also cited by the State, the party opposing admission failed to identify any specific objectionable double-hearsay statements.

excluded police reports that contained “statements by the prosecutor” since Rule 803(8) could excuse only the first level of hearsay (the police reports), and not the second level of hearsay created by the prosecutor’s statements to the police officers. *See id.* Similarly, in *Lewis*, 149 F.R.D. at 487, the Southern District of New York excluded a public report because it contained hearsay statements from government correction officers. *Id.* The court reached the same conclusion in *Eng v. Scully*, 146 F.R.D. 74, 79-80 (S.D.N.Y. 1993), where a public report contained various hearsay statements by government officials. *Id.* (“Only that to which the [preparers of the report] themselves could testify in open court is admissible. Rule 803(8) will not be used to circumvent the hearsay rule.”).⁴

Ultimately, without some justification legally approving the use of a second- or third-level hearsay statement, an agency cannot simply reduce to a writing the out-of-court findings of others and present them as an agency finding without having to produce the actual speaker.

B. Rule 803(8)(C) Does Not Authorize the Admission of Unreliable Scientific or Expert Opinion.

The rule against double hearsay is particularly pertinent with respect to extra-judicial statements relied upon by an agency offering scientific or other expert opinions. As the Tenth Circuit has explained, any such expert testimony “remain[s] subject to *Daubert*.” *Simek v. J.P. King Auction Co.*, 160 Fed. App’x. 675, 686 (10th Cir. 2005) (citing *Desrosiers*, 156 F.3d at

⁴ Some courts have held that a record may be admissible under Rule 803(8)(C) if the report is based upon matters within the personal knowledge of the public official making the record, or upon the statement of a government official *who had a duty to record the information*. *See Chu Kong Yin*, 935 F.2d at 999. But even this more liberal formulation does not result in the admission of all documents containing information passed from one government employee to another, as government employees who supply information are not always under a legal duty to record that information, but may simply provide it as a matter of interest or because the information is requested. Courts have held this helpful sharing of government information (without a duty to record and report) insufficient for purposes of Rule 803(8). *Id.*

962). This is because Rule 803(8)(C) excludes a government report's factual findings where "the sources of information or other circumstances indicate lack of trustworthiness." *Simek*, 160 Fed. App'x. at 686; *Desrosiers*, 156 F.3d at 962. *See also Heary Bros. Lightning Prot. Co. v. Lightning Prot. Inst.*, 287 F. Supp. 2d 1038, 1076 (D. Ariz. 2003) (holding that party could not circumvent *Daubert* by submitting scientific or technical findings contained in a government report). Thus, where a public record relies on or offers expert opinion, the purported public record does not qualify for the public records exception unless the reliability of that opinion may be assessed under the traditional *Daubert* factors.

The State argues that public reports should be admitted simply because they were created pursuant to a clear mandate of law or because they gather substantial amounts of data from experts in the field. But neither statutory authority nor the fact that a report presents vast amounts of data automatically qualifies a document for Rule 803(8)'s exception. Rather, the inquiry remains focused on the ultimate reliability of the document (or portions thereof). For example, in *Toole v. McClintock*, 999 F.2d 1430, 1434-45 (11th Cir. 1993), the Eleventh Circuit held that Rule 803(8) could not justify admission of the FDA's proposal to require pre-market approval for silicone-gel filled breast implants. FDA's document gathered information from 128 pieces of medical literature, *id.* at 1434, n. 8, but was nevertheless interim and based upon hearsay, *id.* at 1434-45. The Eleventh Circuit noted that the "assumption 'that a government agency's findings may be assumed to be trustworthy ... has substantially diminished force when extended to the sources outside the investigative agency from which the agency culls the information for its report.'" *Id.* *See also Lewis*, 149 F.R.D. at 488 (rejecting admission of government investigative record relying on hearsay statements of other government officers because "Rule 803(8) does not circumvent the hearsay rule; any double hearsay contained in a

report is admissible only if each level of hearsay qualifies independently for a hearsay exception.”).

C. Rule 803(8)(C) Requires a Public Record to Reflect an Agency’s Actual Factual Findings, Not Mere Compilations or Drafts

The Tenth Circuit has also made clear that Rule 803(8)(C) does not apply to mere accumulations of information that are not “factual findings” of an agency or to drafts of agency documents. *See, e.g., Figures v. Board of Public Utilities of City of Kansas City*, 967 F.2d 357 (10th Cir. 1992) (holding that a draft letter from the Office of Federal Contract Compliance Programs did not represent the agency’s “factual findings” within the meaning of Rule 803(C)); *Brown v. Sierra Nevada Mem. Miners Hosp.*, 849 F.2d 1186, 1189-90 (9th Cir. 1988) (noting that draft documents and accumulations of information undercut the rationale behind Rule 803(8), which is that the agency conducted its own investigation and reached findings); *City of New York v. Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981) (noting that interim reports are, by their nature, not “factual findings” of an agency). Accordingly, Rule 803(8) does not justify the admission of interim reports. *See Toole*, 999 F.2d at 1434-45; *In re Cessna 208 Series Aircraft Prod. Liab. Litig.*, 2009 WL 2780223 at *3-5 (D. Kan. Sep. 1, 2009); *Appleby v. Glaxo Wellcome, Inc.*, 2005 WL 3440440 at *3 (D.N.J. Dec. 13, 2005). As *McCormick on Evidence* states, “the statement must constitute the conclusion of a government agency as opposed to a mere accumulation of information, and it must not be an interim or preliminary document.” 2 *McCormick on Evidence*, § 296 (6th ed. 2006) (collecting cases); *Smith v. Isuzu Motors Ltd.*, 137 F. 3d 859, 862 (5th Cir. 1998) (“[I]nterim agency reports or preliminary memoranda do not satisfy Rule 803(8)(C)’s requirements.”).

This point is of particular importance in this case, as many of the records the State seeks to introduce consist of annual status updates on the efforts of State agencies to coordinate their

work on environmental matters, or are compilations of statements from numerous other sources. These “updates” are by their very nature interim documents, and thus do not qualify for the hearsay exclusion for final agency findings.

D. Public Records Are Not Trustworthy Where the Party Against Whom the Record is Offered Had No Opportunity to Cross Examine the Record

The nub of the hearsay rule is that admitting out-of-court statements deprives the party against whom they are offered the ability to challenge their accuracy and truthfulness in an adversarial proceeding. Cross-examination is designed to uncover mistakes, errors and omissions. Accordingly, while government documents may generally be presumed accurate, an essential consideration as to their admissibility in litigation is whether the party against whom they are to be offered had an opportunity to participate in their creation.

The Tenth Circuit has instructed that the “[t]he lack of formal procedures and an opportunity to cross-examine witnesses [in making an agency’s factual findings] are proper factors in determining the trustworthiness” of a public report under Rule 803(8). *Denny*, 649 F.2d at 821; *see also Ram v. N.M. Dep’t of Env’t*, 2006 U.S. Dist. LEXIS 95353, at *5-6 (D.N.M. Dec. 11, 2006). Indeed, in the Tenth Circuit, “the trustworthiness of a report is particularly questionable when its conclusion would not be admissible by the direct testimony of the maker or the opportunity to cross-examination had been denied.” *Denny*, 649 F.2d at 821. The Third Circuit has agreed, noting that, where the party against whom a report is offered had no opportunity to participate in an adversarial process, the trustworthiness of out-of-court statements contained in a public report is suspect. *See New Jersey Turnpike Authority*, 197 F.3d at 110.

Many of the hearsay materials the State seeks to introduce in this case (including State Exhibit 5017) set forth opinions regarding contested and complex factual and scientific matters. Because these opinions were recorded without cross-examination or formal hearings, their

conclusions are suspect.

E. Government-Generated Documents Are Not Admissible Public Records Where the Generating Agency May Have Been Biased Or Otherwise Influenced in Generating the Record

Finally, the Tenth Circuit has held that a government agency-generated document is suspect and not necessarily admissible when the preparing agency may have been subjected to bias or other adverse motivation towards the defendant or the subject matter at issue at the time the report was prepared. *Denny*, 649 F.2d at 821; *Ram*, 2006 U.S. Dist. LEXIS 95353, at *5-6. Thus, a government litigant cannot advance its litigation position by preparing an agency report that sets out the same positions the agency is advancing in court and seek to admit those opinions without regard to the ordinary hearsay rules. In this case, many of the documents the State seeks to introduce were written by the State itself *after* 2001, when the State threatened to bring the instant lawsuit.

CONCLUSION

This case should be proven with evidence that is reliable, subject to cross-examination, and not self-serving hearsay generated by a party after the litigation was threatened or commenced. For the foregoing reasons, the State's motion to reconsider the Court's decision excluding States' Exhibit 5107 should be denied.

Respectfully submitted,

BY: /s/ Jay T. Jorgensen
 Thomas C. Green
 Mark D. Hopson
 Jay T. Jorgensen
 Gordon D. Todd
 SIDLEY AUSTIN LLP
 1501 K Street, N.W.
 Washington, D.C. 20005-1401
 Telephone: (202) 736-8000

Facsimile: (202) 736-8711

-and-

Robert W. George
Vice President & Associate General Counsel
Tyson Foods, Inc.
Bryan Burns
Timothy T. Jones
2210 West Oaklawn Drive
Springdale, Ark. 72764
Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-and-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

**ATTORNEYS FOR TYSON FOODS, INC.;
TYSON POULTRY, INC.; TYSON
CHICKEN, INC; AND COBB-VANTRESS,
INC.**

BY: /s/James M. Graves

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Woodson W. Bassett III
Gary V. Weeks
James M. Graves
K.C. Dupps Tucker
BASSETT LAW FIRM

P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

**ATTORNEYS FOR GEORGE'S, INC. AND
GEORGE'S FARMS, INC.**

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL
& ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807

**ATTORNEYS FOR PETERSON
FARMS, INC.**

BY: /s/ John R. Elrod

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574

P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8553

**ATTORNEYS FOR SIMMONS FOODS,
INC.**

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN,
REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
Stephen Williams
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136

**ATTORNEYS FOR CAL-MAINE FARMS,
INC. AND CAL-MAINE FOODS, INC.**

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119

RHODES, HIERONYMUS, JONES, TUCKER &
GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600
**ATTORNEYS FOR CARGILL, INC. AND
CARGILL TURKEY PRODUCTION, LLC**

CERTIFICATE OF SERVICE

I certify that on the 2nd of October, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us

Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	

J. Randall Miller	rmiller@mkblaw.net
-------------------	--------------------

Louis W. Bullock	lbullock@bullock-blakemore.com
------------------	--------------------------------

Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	

Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Motley Rice	

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	

Thomas C. Green	tcgreen@sidley.com
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com

Timothy K. Webster
Frank R. Volpe
Gordon D. Todd
Erik J. Ives
Cara R. Viglucci Lopez
Sidley Austin LLP

twebster@sidley.com
fvolpe@sidley.com
gtodd@sidley.com
eives@sidley.com
cviglucilopez@sidley.com

Robert W. George

robert.george@tyson.com

Michael R. Bond
Erin Walker Thompson
Kutak Rock LLP

michael.bond@kutakrock.com
erin.thompson@kutakrock.com

COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirm.com
rer@owenslawfirm.com

James M. Graves
Gary V. Weeks
Paul E. Thompson, Jr.
Woody Bassett
Jennifer E. Lloyd
Bassett Law Firm

jgraves@bassettlawfirm.com
pthompson@bassettlawfirm.com
wbassett@bassettlawfirm.com
jlloyd@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
P. Joshua Wisley

jelrod@cwlaw.com
vbronson@cwlaw.com
jwisley@cwlaw.com

Conner & Winters, P.C.

Bruce W. Freeman
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

bfreeman@cwlaw.com

John H. Tucker
Leslie J. Southerland
Colin H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker & Gable

jtuckercourts@rhodesokla.com
ljsoutherlandcourts@rhodesokla.com
chtucker@rhodesokla.com
thillcourts@rhodesokla.com

Terry W. West
The West Law Firm

terry@thewesetlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann Kleibacker Lee
Todd P. Walker
Faegre & Benson LLP

dehrich@faegre.com
bjones@faegre.com
kklee@baegre.com
twalker@faegre.com

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves
D. Kenyon Williams, Jr.
COUNSEL FOR POULTRY GROWERS

mgraves@hallestill.com
kwilliams@hallestill.com

William B. Federman
Jennifer F. Sherrill
Federman & Sherwood

wfederman@aol.com
jfs@federmanlaw.com

Charles Moulton
Jim DePriest
Office of the Attorney General

charles.moulton@arkansasag.gov
jim.depriest@arkansasag.gov

COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Carrie Griffith
COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

griffithlawoffice@yahoo.com

Gary S. Chilton
Holladay, Chilton & Degiusti, PLLC

gchilton@hcdattorneys.com

Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon, LLP

vschwartz@shb.com
csilverman@shb.com

Robin S. Conrad
National Chamber Litigation Center, Inc.
**COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND
THE AMERICAN TORT REFORM ASSOCIATION**

rconrad@uschamber.com

Richard C. Ford
LeAnne Burnett
Crowe & Dunlevy
COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

fordr@crowedunlevy.com
burnettl@crowedunlevy.com

M. Richard Mullins
McAfee & Taft

richard.mullins@mcafeetaft.com

James D. Bradbury
James D. Bradbury, PLLC
**COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE
FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS
ASSOCIATION OF DAIRYMEN**

jim@bradburycounsel.com

Diane Hammons
Sara Hill
COUNSEL FOR THE CHEROKEE NATION

Diane-Hammons@cherokee.org
Sarah-Hill@cherokee.org

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
**COUNSEL FOR THE STATE OF
ARKANSAS AND THE ARKANSAS
NATURAL RESOURCES COMMISSION**

John E. and Virginia W. Adair Family Trust
Route 2 Box 1160
Stilwell, OK 74960

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Cary Silverman
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

Cherrie House
P.O. Box 1097
Stilwell, OK 74960

David Gregory Brown
Lathrop & Gage LC (Jefferson City)
314 E High Street
Jefferson City, MO 65101

Donna S Parker
34996 S 502 Road
Park Hill, OK 74451

Doris Mares
14943 SE 15th Street
Choctaw, OK 73020-7007

G Craig Heffington
20144 W Sixshooter Road
Cookson, OK 74427

George R Stubblefield
HC-66, Box 19-12
Proctor, OK 74457

Gordon W. and Susann Clinton
23605 S Goodnight Lane
Welling, OK 74471

Jerry M Maddux
Selby Connor Maddux Janer
P.O. Box Z
Bartlesville, OK 74005-5025

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Jonathan D Orent
Motley Rice LLC (Providence)
321 S Main Street
Providence, RI 02940

Marjorie Garman
19031 US HWY 412
Colcord, OK 74338-3861

Randall E Kahnke
Faegre & Benson (Minneapolis)
90 S 7th Street, Suite 2200
Minneapolis, MN 55402-3901

Richard E Parker
34996 S 502 Road
Park Hill, OK 74451

Robin L. Wofford
Route 2, Box 370
Watts, OK 74964

Steven B Randall
58185 County Road 658
Kansas, OK 74347

Victor E Schwartz
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

William House
P.O. Box 1097
Stilwell, OK 74960

/s/ Jay T. Jorgensen